IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
February 10, 2012

NO. 33,386

ANTONIO MAESTAS and BRIAN EGOLF, members of the New Mexico House of Representatives, and JUNE LORENZO, ALVIN WARREN, ELOISE GIFT and HENRY OCHOA,

Petitioners,

v.

HON. JAMES A. HALL, District Judge Pro Tempore of the First Judicial District Court,

Respondent,

and

SUSANA MARTINEZ, in her capacity as Governor of New Mexico, et al.,

Real Parties in Interest,

and

MAURILIO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY and ROXANE SPRUCE BLY, PUEBLO OF LAGUNA, PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF ZUNI, PUEBLO OF SANTA ANA, PUEBLO OF ISLETA, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA AND LEON REVAL, NAVAJO NATION, LORENZO BATES, DUANE H. YAZZIE, RODGER MARTINEZ, KIMMETH YAZZIE AND ANGELA

BARNEY NEZ,

Intervenors.

and

NO. 33,387

TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,

Petitioners,

v.

THE NEW MEXICO COURT OF APPEALS,

Respondent,

and

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her capacity as New Mexico Governor, and JOHN A. SANCHEZ in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate,

Real Parties in Interest,

and

JONATHAN SENA, DON BRATTON, CARROLL LEAVELL, GAY KERNAN, CONRAD JAMES, DEVON DAY, MARGE TEAGUE, MONICA YOUNGBLOOD, JUDY MCKINNEY, JOHN RYAN, MAURILIO CASTRO, BRIAN F. EGOLF, JR., MEL HOLGUIN, HAKIM BELLAMY AND ROXANE SPRUCE BLY, PUEBLO OF LAGUNA, PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF ZUNI, PUEBLO OF SANTA ANA, PUEBLO OF ISLETA, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA AND LEON REVAL, NAVAJO NATION, LORENZO BATES, DUANE H. YAZZIE, RODGER MARTINEZ, KIMMETH YAZZIE AND ANGELA BARNEY NEZ,

Intervenors.

ORDER

WHEREAS, this matter came on for consideration upon petitions for writs of superintending control and certification from the New Mexico Court of Appeals, the Court having considered the briefing and oral argument of the parties and being sufficiently advised, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Edward L. Chavez, concurring, Judge Jonathan B. Sutin dissenting;

NOW, THEREFORE, IT IS ORDERED that the district court's judgment and final order regarding the creation of districts for the New Mexico House of Representatives is REVERSED and REMANDED for further proceedings consistent with the reasons and directions that follow:

INTRODUCTION

At issue in this case is the apportionment of the New Mexico House of Representatives following the 2010 federal census. *Profile of General Characteristics for the United States*, United States Census Bureau (2010). The House of Representatives must be composed of seventy members elected from single-member districts. N.M. Const. art. IV, § 3(C). The Legislature may by statute reapportion its membership after every decennial census. N.M. Const. art. IV, § 3(D). The 2010 census indicates that the population in New Mexico is 2,059,179 people, an increase of 13.2 percent over the 2000 census. In order to achieve the ideal population, under the one person one vote principle, each House District should have a population of 29,417 people. The current House Districts have population deviations from the ideal population ranging from negative 24.3 percent to a positive 100.9 percent, for a total deviation range of 125.2 percent. **[FOF 2-6]** The population growth in West Albuquerque and Rio Rancho indicate that this area can support three additional house districts. Slower growth in North Central and Southeastern New Mexico, as well as Central Albuquerque, indicate that these areas each currently have one additional district, or so the court below could reasonably find. **[FOF 9-11]**

It is undisputed that the existing House Districts are unconstitutionally apportioned. *See Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (interpreting the Equal Protection Clause to require "a State to make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"). Thus, significant changes in the districts are necessary to comply with the one person, one vote mandate of the Equal Protection Clause. The House of Representatives, during a 2011 Special Session called for the purpose of reapportionment, passed House Bill 39 reapportioning the House. Every Republican legislator and two Democrat legislators voted against House Bill 39, and Governor Susana Martinez ultimately vetoed it.[1] Because the lawmaking process failed to create constitutionally acceptable districts, the burden fell on the judiciary to draw a reapportionment map for the House. To accomplish this task, we designated retired Judge James Hall, a hard-working jurist with an impeccable reputation for fairness and impartiality, to assume this arduous undertaking.

After eight days of testimony and the submission of numerous reapportionment maps by the parties, Judge Hall adopted, in part, the third alternative plan submitted

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[1]The Legislature was unable to pass reapportionment legislation relating to the state Senate, Congress, or the Public Regulation Commission.

by the attorneys representing Governor Martinez and Lieutenant Governor John Sanchez. Executive Alternative Plan 3 was developed in part to address criticisms from other demographers who testified during the trial, and to incorporate Judge Hall's suggestion that the Multi-Tribal/Navajo Nation plan addressing Voter Rights Act issues in the Northwestern region of New Mexico be included in the executive plan. The adopted plan was tendered on the last day of testimony after the executive demographer and other expert witnesses were not available to testify. However, Brian Sanderoff, a local demographer, did testify about Executive Alternative Plan 3.

The district court entered detailed findings of fact and conclusions of law regarding Executive Alternative Plan 3 and the rejected plans submitted by other parties, including the plan passed by the Legislature as House Bill 39. The legislative plan was rejected because it systematically left North Central and Southeastern New Mexico underpopulated, which diluted the votes of the persons in the more populated areas of the state: specifically west Albuquerque, Rio Rancho, and Doña Ana County. **[FOF 41]** An overriding, related concern included the failure of the legislative plan to consolidate a district in North Central New Mexico. **[FOF 35]** The district court rejected another proposed plan because of "significant partisan bias."

[FOF 87] It rejected one plan because of "highly partisan incumbent pairings" **[COL 30]** and another plan because of the pairing of "the only Republican incumbent in north central New Mexico with a Democratic incumbent and splits Los Alamos and White Rock." **[COL 29]** Other plans were rejected because of the failure "to establish Native American districts as contained in the Multi-Tribal/Navajo Nation Plan under the Voting Rights Act." **[COL 31, 32]** The district court adopted Executive Alternative Plan 3, with some additional modifications, because it found that it had the lowest population deviations between districts, it adhered to the Voting Rights Act, and it reasonably satisfied secondary reapportionment policies. **[COL 34-36]** The district court acknowledged that Executive Alternative Plan 3 impacted partisan performance measures, but determined that, because all of the plans had some partisan effect, it was compelled not to allow partisan considerations to control the outcome of its decision. **[COL 35]**

We agreed to hear arguments on Petitioners' petitions for writs of superintending control and established an extremely expedited briefing schedule designed to permit this Court to conduct oral argument on February 7, 2012. After considering the written submissions of the parties and hearing oral argument, we remand this matter to the district court for further proceedings consistent with this

order. A formal opinion will be issued at a later date; however, this order is intended to outline the holding of this Court.

ANALYSIS

A. Legal principles

1. Redistricting is primarily the responsibility of the State Legislature. Therefore, plans that the Legislature has passed but have failed to be enacted into law, such as House Bill 39, are due "thoughtful consideration." *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 197 (1972).

2. State legislative district plans require only "substantial" population equality. *See Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

3. When called upon to draw a redistricting map, a court acts in equity and may adopt a plan submitted by a party, modify such a plan, or draw its own map. *See O'Sullivan v. Bryer*, 540 F. Supp. 1200, 1202-03 (D. C. Kan. 1982).

4. Deviations from population equality are appropriate to address significant state policies or unique features. *See Reynolds*, 377 U.S. at 579. Although maximum population equality and whether a plan dilutes the vote of any racial minority are primary considerations, courts should consider "the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the

reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973). Adhering to state policies is a way in which courts can give effect to the will of the majority of the people. *Preisler v. Secretary of State*, 341 F. Supp. 1158, 1161-62 (D.C. Mo. 1972).

5. It is important to consider whether a plan continues the policies of New Mexico as they are expressed in its previous redistricting plans. *See White*, 412 U.S. at 795-96 (1973). The guidelines that were unanimously adopted by the bi-partisan New Mexico Legislative Council set forth policies that are similar to policies that have been recognized as legitimate by numerous courts, as well as courts of this state, and should be considered by a state court when called upon to draw a redistricting map. The policies set forth in the guidelines include the following:

a. *Maintaining low population deviations from equal districts using data from the most recent U.S. Census*. Legislative plans with deviations greater than plus-or-minus five percent are prima facie unconstitutional and require a showing that greater deviations are justified by a legitimate state purpose. *See Brown v. Thompson*, 462 U.S. 835, 842 (1983). This principle was most recently applied ten years ago, when the state district court utilized a range of plus-or-minus five-percent deviations

in creating a redistricting plan for the House of Representatives. *Jepsen v. Vigil-Giron*, No. D-0101-CV-02177 (D. Ct. Jan. 24, 2002).

b. *Comporting with the Voting Rights Act and federal constitutional standards*. For the purposes of Section 2 of the Voting Rights Act, only eligible voters affect a group's opportunity to elect candidates. Therefore, the question is whether the minority group has a citizen voting-age majority in the district. *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 427-28 (2006). Also under Section 2, because the injury is vote dilution, the *Gingles* compactness inquiry considers "the compactness of the minority population, not . . . the compactness of the contested district." *Bush v. Vera*, 517 U.S. 952, 997 (Kennedy, J., concurring) (referencing *Thornburg v. Gingles*, 478 U.S. 30 (1986)). Race may be considered, but not as a predominant consideration over traditional redistricting principles, which are outlined below. A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.* at 979. Section 2 compactness should take into consideration "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* at 977; *see also Shaw v. Reno*, 509 U.S. 630, 647 (1993) (reasoning that traditional districting principles "are important not because they are constitutionally

required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." (internal citation omitted)).

c. *Using single-member districts*. N.M. Const. art. IV § 3(C).

d. *Drawing districts with traditional redistricting principles*:

i. *Districts shall be composed of contiguous precincts and be reasonably compact. See, e.g.*, NMSA 1978 § 2-7C-3. Compactness and contiguity reduce travel time and costs, and therefore make it easier for candidates for the Legislature to campaign for office, and once elected, to maintain close and continuing contact with the people they represent. It has also been suggested that compactness and contiguity greatly reduce, although they do not eliminate, the possibilities of gerrymandering. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301.

ii. *Consideration of political and geographic boundaries.* Minimizing fragmentation of political subdivisions, counties, towns, villages, wards, precincts, and even neighborhoods allows constituencies to organize effectively and decreases the likelihood of voter confusion regarding other elections based on

political subdivision geographics. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (1992).

iii. *Preserving clear communities of interest.* We interpret communities of interest to include a contiguous population which shares common economic, social, and cultural interests that should be included within a single district for purposes of its effective and fair representation. *See O'Sullivan*, 540 F. Supp. at 1204. The rationale for giving due weight to other types of clear communities of interest is because "to be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents." *Prosser*, 793 F. Supp. at 863.

iv. *Preserving cores of existing districts.*

e. *Choosing to avoid contests between incumbents running for reelection is an optional consideration. Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Incumbency considerations, however, cannot be justified if they are simply for the benefit of the officeholder and not in the interests of the constituents. *See LULAC v. Perry*, 548 U.S. 399, 441 (2006).

6. The most fundamental tenet of judicial administration and independence is

that the process must be fair, and it must also appear to be fair. *See Peterson v Borst*, 786 N.E.2d 668, 673 (Ind. 2003). Because the redistricting process is embroiled in partisan politics, when called upon to draw a redistricting map, a court must "do so with both the appearance and fact of scrupulous neutrality." *Id.* at 673. To avoid the appearance of being embroiled in partisan politics, a judge should not select a plan that seeks partisan advantage. Thus, a proposed plan that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda is unacceptable for a court-drawn plan. *See Wilson v. Eu*, 823 P.2d 545, 576-77 (1992) ("[T]he submission of three plans, each with calculated partisan political consequences (the details of which are unknown) creates a severe dilemma for us. We have no principled way to choose between the plans, especially knowing that we would be endorsing an unknown but intended political consequence by the choice we make. For this reason alone we would feel compelled to reject the plans."). A court's adoption of a plan that represents one political party's idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality. *Peterson*, 786 N.E.2d at 673. Although some courts are indifferent to political considerations such as incumbency or party affiliation, *Burling v. Chandler*, 804 A.2d 471, 474 (N.H. 2002), other courts

question the wisdom of such indifference, *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.").

7. Although asymmetry (partisan bias) is not a reliable measure of *unconstitutional* partisanship, *LULAC v. Perry*, 548 U.S. 399, 420 (2006), it should be considered as "a measure of partisan fairness in electoral systems," *id.* at 466 (Stevens, J., concurring).

8. This is the first opportunity in this State's long history for the Supreme Court to address the overarching legal principles that govern court-drawn redistricting, and it is only the second time for any court in our state judiciary to have done so. Accordingly, it is incumbent on this Court to recognize or ratify those legal principles that vindicate statutory and constitutional imperatives while also supporting significant, legitimate state policies that are vital for redistricting. Because of our role as final arbiter of state law, it is important that we review this case largely under a de novo standard, so as to provide guidance both to the court below and to future courts tasked with redistricting. Contrary to the views of the

dissent, our job here is not merely to review for an abuse of discretion or substantial evidence. The Supreme Court has a constitutional mandate to establish what the rule of law is and to clarify the law if it has not been interpreted correctly. It would be unsound jurisprudence to do otherwise.

B. Specific issues in this case.

Applying these principles to the case before us, we conclude as follows:

1. Pursuit of precise population equivalence at the cost of other, legitimate state redistricting policies, such as those adopted by the bi-partisan Legislative Council, is inconsistent with existing legal principles and with the established precedent and custom of this State. When other policies, such as avoiding bifurcation of municipalities and other recognized communities of interest, can be obtained with population deviations within the more flexible deviations applied historically, it is the duty of the court to accommodate those legitimate state interests, where feasible, or explain why it could not do so. *See Jepsen v. Vigil-Giron*, No. D-0101-CV-02177 (D. Ct. January 24, 2002). The same holds true for plans that inflict significant partisan bias, even if it is unintended, if that bias can be ameliorated through the use of permissible, greater population deviations. In this case, the district court concluded that it was bound to a plus-or-minus one-percent population deviation with the

exception of addressing Voting Rights Act infractions. That conclusion is inconsistent to the extent it precludes greater deviations where justified by existing legal principles and by the precedent and policy of this State, which requires a remand for the court to address the issues set forth in this order. It is also inconsistent with *Jepsen*, where Judge Allen allowed greater deviations and did not permit radical or partisan changes unless the law required. *Id.* at 8, 12.

2. The district court was not indifferent to partisan considerations. It considered evidence regarding the partisan bias of various plans, and acknowledged the same in its findings and conclusions of law. However, the plan ultimately adopted by the district court, Executive Alternative Plan 3, did not undergo the same scrutiny for partisan bias that the majority of plans previously considered had undergone. The plan adopted by the district court was introduced into evidence on the last day of trial during the testimony of Brian Sanderoff, who pointed out the existence of significant partisan performance changes as a result of that plan. **[12/22/11 pgs. 55-66]** Consistent with that testimony about partisan performance changes, the district court found, as well, that Executive Alternative Plan 3 increased Republican swing seats from five to eight over prior executive plans. In addition, the number of majority Republican districts increased from 31 in the original executive

plan to 34 in Executive Alternative Plan 3. **[FOF 72]** Mr. Sanderoff testified that Executive Alternative Plan 3 could have been drafted with less partisan change and bias, perhaps with the use of slightly greater population deviations. **[12/22/11 Tr. 118-119]** Because of this testimony and the district court's rejection of other plans for perceived partisan bias considerations, and because of its own recognition of that fact in the proffered plan, the district court should have rejected Executive Alternative Plan 3 for similar bias, at least as it was offered.

3. The incumbent pairings in Executive Alternative Plan 3 appear to have contributed to the partisan performance changes in the plan. In three consolidations, the resulting shift of six seats created a partisan swing of two seats in favor of one party. The three new seats, two Republican and one Democrat, correctly reflected the political affiliation of the population in those high-growth areas on the west side of Albuquerque and in Rio Rancho, a result we do not question. However, the source of those three seats is subject to question for partisan bias. Two of the consolidated seats, one a Democrat-Democrat consolidation in North Central New Mexico, and the other a Republican-Republican consolidation in Southeastern New Mexico, are partisan-neutral in effect. The third consolidated district, in Central Albuquerque, however, raises questions. Despite combining a Republican and a Democrat seat, it

resulted in a strongly partisan district favoring one party, in effect tilting the balance for that party without any valid justification. The resulting district is oddly shaped in an area where compactness is apparently relatively easy to achieve, suggesting, at least in part, that the district was created to give political advantage to one party. This result was not politically neutral and raises serious questions as to its propriety in a court-ordered plan that should be partisan-neutral and fair to both sides.

4. The district court made findings of fact related to Clovis, New Mexico that satisfied the precondition criteria for a Voting Rights Act analysis as it relates to the Hispanic population in this area. The district court specifically found that "[t]he Hispanic community in and around Clovis is sufficiently large and geographically compact to constitute a majority in a single-member district," that the community "is politically cohesive," and that "Anglos in the area vote sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate." **[FOF 64, 65]** Previously, a federal three-judge panel, having found a detailed history of racial and ethnic discrimination affecting that same population, redrew House District 63 to include compact and politically cohesive Clovis minorities and make the district a performing, effective majority-minority district, as that term is commonly understood in Voting Rights Act jurisprudence. *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984).

Though redrawn in shape, that district has remained an effective majority-minority district since that time, including the most recent court-ordered redistricting plan in the *Jepsen* case. In the present trial, there was no evidence to establish that the district had materially changed so as to no longer require an effective majority-minority district. Therefore, those same considerations that led to a redrawing of House District 63 continue to apply to that community, and must be reflected in any court-ordered plan.

5. We agree with the district court on the following points:

a. Including the Native American districts as contained in the Multi-Tribal/Navajo Nation Plan is essential under the Voting Rights Act and shall be included without the need for any change in the court-drawn map.

b. Although consolidation of districts coupled with moving one of the consolidated districts is not the only way to address population disparities when drawing new district boundaries to comply with the Equal Protection Clause, in this case the district court appropriately exercised its equitable powers to insist on the consolidation of districts in the underpopulated regional areas of North Central and Southeastern New Mexico, as well as Central Albuquerque. The problems previously noted with the Central Albuquerque consolidation go not to the fact of consolidation,

but to the resulting manner in which it was accomplished.

c. The district court was not required to adopt the legislative plan in House Bill 39, as long as it gave that plan thoughtful consideration.

d. The district court was not required to preclude Governor Martinez from introducing redistricting plans during the litigation, despite the district court's findings that the Governor did not submit redistricting plans during the special session.

C. Remand instructions.

For the reasons stated above, this matter is remanded to the district court to draw a reapportionment map with the assistance of an expert under Rule 11-706 NMRA. In doing so, the district court should rely, as much as possible, on the evidence presently in the record, and it should not admit additional evidence from the parties. The district court should consider historically significant state policies as discussed herein through the use, where justified, of greater population deviations as set forth in the Legislative Council guidelines. At the district court's discretion, the parties may be permitted, but are not entitled, to file briefs identifying what state policies are supported by the evidence in the record that will assist the court in drawing a plan that results in less partisan performance changes and fewer divisions

of communities of interest than the plan it adopted. Also in the district court's discretion, Brian Sanderoff would be a permissible candidate to serve as a Rule 11-706 expert, because of time constraints and his established expertise. Whether or not to use any of the maps that were introduced into evidence as a starting point, including Executive Alternative Plan 3, is within the discretion of the district court. The parties shall have an opportunity to comment on a preliminary plan proposed by the district court before it ultimately adopts a final plan. The final map must take into account the following considerations:

1. *Population deviations*. Executive Alternative Plan 3 achieved very low population deviations, but it was at the expense of other traditional state redistricting policies, the most evident being the failure to keep communities of interest, such as municipalities, intact. Some cities were divided to maintain low population deviations among the different districts. On remand, the district court should consider whether additional cities, such as Deming, Silver City, and Las Vegas, can be maintained whole through creating a plan with greater than one-percent deviations. While low population deviations are desired, they are not absolutely required if the district court can justify population deviations with the non-discriminatory application of historical, legitimate, and rational state policies.

2. *Partisan performance changes*. On remand, the goal of any plan should be to devise a plan that is partisan-neutral and fair to both sides. If the district court chooses to begin with the plan it adopted previously, it should address the partisan performance changes and bias noted in this order, and if the bias can be corrected or ameliorated with enunciated non-discriminatory application of historical, legitimate, and rational state policies, including through the use of higher population deviations, then the district court should do so.

3. *As part of the review of partisan performance changes, the district court should consider the partisan effects of any consolidations*. Any district that results from a Democrat-Republican consolidation, if that is what the district court elects to do, should result in a district that provides an equal opportunity to either party. In the alternative, some other compensatory action may be taken to mitigate any severe and unjustified partisan performance swing. The performance of created districts as well as those left behind should be justified.

4. *Hispanic "Majority" District in House District 67*. It does not appear that the district court considered Hispanic citizen voting age populations in reaching its decision, and it should do so on remand. Whatever its eventual form, the relevant Clovis community must be represented by an effective, citizen, majority-minority

district as that term is commonly understood in Voting Rights Act litigation, and as it has been represented, at least in effect, for the past three decades.

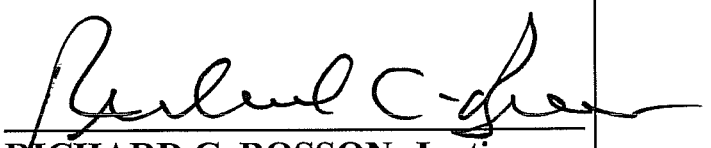
Time is of the essence. The district court is urged to make every effort to conclude this matter expeditiously, no later than February 27th, 2012, or otherwise advise this Court. Because this Court has announced in this order the legal principles that will govern court-drawn redistricting maps in New Mexico, any appeal of the district court's final map will only be reviewed for an abuse of discretion or for substantial evidence.

In conclusion, we note the extraordinary work of Judge Hall in this case, and we are mindful of the extra demands imposed upon him by this remand order. His service on behalf of the State of New Mexico is greatly appreciated.

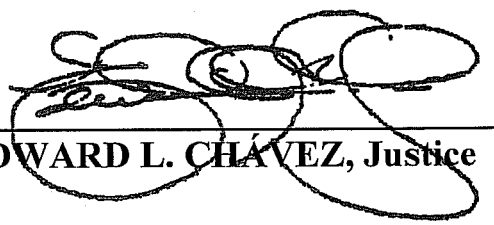
IT IS SO ORDERED.

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice



RICHARD C. BOSSON, Justice



EDWARD L. CHÁVEZ, Justice

JONATHAN B. SUTIN, Judge
Sitting by designation, dissenting

SUTIN, Judge (dissenting).

The Majority's decision that its order be filed immediately has allowed me time and opportunity to only generally address why I oppose the remand requiring Judge Hall to revamp the plan according to the rules laid down by the Majority. The immediacy has not allowed me time and opportunity to rebut the Majority's determinations on the merits of the issues as contained in the order. Based on the detail in the order deciding the merits of the issues, and the requirement that Judge Hall change the plan, I tend to doubt that any follow-up Majority opinion will be needed, and I tend to doubt that the extensive detailed work required for a dissent will be useful.

I respectfully oppose entry of the Majority's remand order. There exists no need to require Judge Hall to consider facts and law that he has already thoroughly considered. There exists no need for reconsideration of how Judge Hall applied the law of population deviation when it is clear that he understood the law and did not misapply it. Nor is there a need to remand for Judge Hall to reconsider facts (implying, it seems, to also change his mind) relating to any alleged Fourteenth Amendment or Voting Rights Act violation or relating to secondary factors such as communities of interest.

Of course, this Court is not to rubber stamp Judge Hall's work and plan. At the same time, however, it is important to note that the Supreme Court's appointment of Judge Hall was purposeful and an excellent choice. Judge Hall was a highly respected judge for his fairness, good judgment, principled and rational decisions, seasoned analytic ability, and his ability to grasp complex issues. In his known judicial capacity, Judge Hall did not act arbitrarily. In these important circumstances, Judge Hall would not and did not, here, create a plan that he saw or felt or believed contained any partisan effect or bias that violated the Fourteenth Amendment. He would not have put forth a plan if the evidence supported a determination that the plan violated the Voting Rights Act. He would not have created a plan that would fail to withstand strict scrutiny. In his consideration of secondary factors, he would not have created a plan that, in his view, failed to protect communities of interest.

Reapportionment cases are known for their rampant partisanship, whether at the legislative level or in the court. The cases are complex. Population increase over ten years requires change. Redistricting is necessary. Expert map drawers, political scientists, and historians are involved. Witness testimony and documentary evidence fills volumes. The quest for the perfectly neutral reapportionment map devoid of partisan effect or bias is illusory. Parties and courts quote what they want from the

United States Supreme Court and lower federal courts, as well as from state courts, for favorable language to support their positions.

The overriding goal is population equality and to serve the constitutional principle of "one man-one vote." Once in court, the search involves pathways through various proposed plans offered by partisans. Those in power want to keep their seats and obtain more seats; those out of power want to keep their seats and obtain more seats. The court must give thoughtful consideration to the plans and listen to the arguments. First and foremost, the court sits in equity and tries to structure a plan within the constraints of the Fourteenth Amendment and the Voting Rights Act.

If, in drawing a plan, the court exceeds minimal population deviation, the court must justify the deviation based on legitimate state interests which appear to consist of traditional state redistricting policies and practices. Here, the court started with the clear constitutional mandate of minimum deviation from population equality. At some point, Judge Hall determined that he was required to substantially deviate from population equality with regard to Native American communities in order to satisfy the requirements of the Voting Rights Act. Judge Hall appropriately justified the deviation. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (explaining what

proof is necessary for a court to find a violation of Section 2 of the Voting Rights Act).

With respect to the population deviation that Judge Hall maintained at minimal levels, he had nothing to "justify" because that minimal deviation is what the law requires unless a deviation is necessary to satisfy legitimate state interests. Those attacking minimal deviation have the burden of advocating for a particular deviation and then justifying the deviation based on legitimate state interests. To the extent parties launched that attack, Judge Hall determined that the evidence presented was insufficient to require a deviation. To the extent that parties attacked Judge Hall's plan because it unfairly diluted Hispanic voting power, Judge Hall determined that the evidence presented was insufficient to support any claimed violation of the Fourteenth Amendment or the Voting Rights Act. Moreover, all of the plans split some communities of interest. Furthermore, communities of interest are defined in many different ways, they are what they are based on the eyes of the beholder, and are, for the most part, partisan driven.

The parties now attacking Judge Hall's plan submitted extensive requested findings of fact and conclusions of law stating the various reasons why their respective plans should be adopted by the court. Judge Hall did not adopt their

requested findings, thereby effectively finding against those parties and the propriety of their plans. The parties have not attacked with the required specificity Judge Hall's findings of fact, among which are: that his plan includes thirty districts with Hispanic voting age population over 50 percent, maintaining the highest number of districts with a Hispanic voting age population over 50 percent [FOF 71]; that incorporating the Native American plans caused the number of swing districts of 49-51 percent to increase from five to eight, and the number of majority Republican performance districts (over 50 percent) to reach 34 [FOF 72]; that his plan avoids splitting communities of interest (particularly the Native American communities of interest) to a reasonable degree [FOF 74]; that he gave thoughtful consideration to all plans (plus amended, modified, and alternative), including the unenacted Legislative Plan [COL 27, 28]; that he considered the totality of circumstances when considering whether the plan violated the Voting Rights Act [FOF 22].

The issues on which the Majority want to remand this case are intensely fact-based and fact-driven. This Court should not and has no need to (1) disregard the exceptional care Judge Hall took in determining whether the parties attacking the plan and advocating their own plans fulfilled their proof burdens and (2) draw a conclusion that, as a matter of law, those parties proved a Fourteenth Amendment or

Voting Rights Act violation or that some secondary factor necessarily overrides the plan.

Nothing in this case shows that Judge Hall failed to consider all of the evidence presented. Nothing shows that he failed to give thoughtful consideration to everything offered by the parties. From the record and from his extensive findings of fact and conclusions of law, it is readily apparent that Judge Hall considered all of the evidence and gave thoughtful consideration to the presentations of the parties.

Judge Hall looked at the various plans, discussed his concerns about several of them, and made suggestions to parties about how they might improve the palatability of their plans by considering certain changes. Some made changes; others did not. This was the process Judge Hall chose instead of attempting to draw a virgin plan. In fact, to adopt aspects of plans proposed by the executive and legislative parties following extensive testimony and plan modifications indicates a process that considers the will of the people.[2] I do not agree with the Majority that Judge Hall's process was flawed because it did not satisfy a requirement of judicial

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[2]I note that the "will of the people" was involved here from start to finish. While the legislative plan passed the House, all Republicans and a few Democrats voted against passage, the Governor vetoed the plan, any veto override was unlikely and not attempted, Judge Hall rejected the legislative plan, and several parties advocating their interests fully presented their positions and views at trial.

neutrality or independence.

In my view, nothing in the Majority's cited case of *Peterson v. Borst*, 786 N.E.2d 668 (Ind. 2003), which involved a City-County redistricting plan, requires remand. I see no basis on which to question Judge Hall's or "the judiciary's" neutrality and independence given the nature of the trial; the manner in which Judge Hall conducted the trial; the parties' full opportunity to present their witnesses, documents, and arguments; Judge Hall's detailed study of the various plans; and his interactions with the parties and recommended plan changes. Judge Hall handled this case "in a manner free from any taint of arbitrariness or discrimination." *See id.* at 672 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

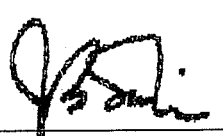
Ultimately, based on how he viewed all of the various plans and any modifications made, and based on how he evaluated the credibility of the witnesses, the models, the various analyses, and the reasonableness of testimony and counsel's arguments, Judge Hall thought that the Executive Plan, as modified, was a fair, reasonable, and appropriate plan.

All plans suffered from partisan effect. Will any plan be devoid of some partisan effect? The parties that contend that the plan must be overturned state the standard to be "severe" and "significant" partisan bias. There exists no evidence in

this case that Judge Hall intended or adopted a plan that violated the Fourteenth Amendment because of severe or significant partisan bias. Nothing in the plan shows any egregiousness, and nothing in the evidence indicates that any attempt at neutrality (which, although not a word used in the Order, is what I believe the Majority actually requires) or, even as the Order indicates, "less partisan effect," will relieve the challengers or the Majority of their view that any Republican advantage that results in seat gain from the status quo constitutes a partisan bias that violates the Fourteenth Amendment. Democrats keep their statewide majority under the plan. Several districts with Republican advantage are competitive. Judge Hall's plan was in no way driven by partisan bias. Nothing in the record indicates that Judge Hall's goal, much less overriding goal, was to effect partisan change. If the Majority wants Judge Hall to move things around to obtain "less partisan effect," does that take us to some sort of status quo, and will the status quo violate population shifting requirements? The answer to the question of partisan bias can depend in part on tests or models used. Several were under consideration. Judge Hall was not required to apply any one of them in particular or to rely on them as the sole basis on which to decide whether the proof showed a partisan effect or bias that violated the Fourteenth Amendment. Furthermore, no evidence bound Judge Hall to find that there was actual harm or

undue prejudice to Democrats, who continue to maintain a majority of the seats in the House.

There exists no basis on which to learn more from Judge Hall on any issue. Nothing in the record shows that Judge Hall abused his discretion in any respect. He did not misapprehend or misconstrue the law. He was in no way arbitrary. He does not need to provide further explanation about his determinations. Nothing proves that the plan will create serious problems in the future. This matter is not in need of remand. Judge Hall's plan is an appropriate stopping place. The election process needs to go forward now, without a delay of reconsideration or instruction essentially requiring Judge Hall to reduce Republican seats, without the delay of a 706 expert already shown through his testimony to have opinions about issues in the case, and without a delay involving the required opportunity to comment on any new plan or any changes. The stopping point of Judge Hall's plan is eminently more wise and fair than the stopping point of the next, reconstituted plan, with no fair opportunity to follow allowing the party opposing the plan to obtain relief in this Court.



JONATHAN B. SUTIN, Judge